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SALHANY and G. KENNEDY THOMPSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 Please take notice that on February 3, 2012, at 9:00 a.m., or as soon thereafter as the matter
 3 may be heard by the Court, at the courtroom of the Honorable Edward J. Davila, Courtroom 1,
 4 Fifth Floor, United States District Court, 280 South 1st Street, San Jose, California, defendants
 5 Marc L. Andreessen, Lawrence T. Babbio, Sari M. Baldauf, Rajiv L. Gupta, John H. Hammergren,
 6 Joel Z. Hyatt, John R. Joyce, Robert L. Ryan, Lucille S. Salhany and G. Kennedy Thompson (the
 7 “Director Defendants”) will and hereby do move the Court, pursuant to Rule 12(b)(6) of the
 8 Federal Rules of Civil Procedure, for an order dismissing with prejudice Counts I and III contained
 9 in the Verified Shareholder Derivative Complaint (the “Complaint”) asserted against the Director
 10 Defendants. The motion will be based on this notice and motion, the accompanying memorandum
 11 of points and authorities, the accompanying request for judicial notice, the declaration of Richard S.
 12 Horvath, Jr., any other papers filed with the Court in connection with this motion, the arguments of
 13 counsel and all other matters properly considered by the Court. This motion to dismiss is brought
 14 on the ground that the Complaint fails to state a claim against the Director Defendants upon which
 15 relief can be granted.

16 In addition, the Director Defendants join in the motion of nominal defendant Hewlett-
 17 Packard Company (“HP”) to dismiss this action with prejudice pursuant to Rules 12(b)(6) and 23.1
 18 of the Federal Rules of Civil Procedure for failure of the plaintiff to make a demand on the board
 19 of directors of HP before commencing this shareholder derivative action or to plead with
 20 particularity sufficient reasons to excuse demand.

21 DATED: August 15, 2011

22 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

23 By: _____ /s/ James E. Lyons
 24 _____
 25 JAMES E. LYONS
 26 Attorneys for Defendants
 27 MARC L. ANDREESSEN, LAWRENCE T. BABBIO,
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STATEMENT OF ISSUES**(N.D. CAL. CIVIL L.R. 7-4)**

1. Whether plaintiff fails to state a cause of action against defendants Marc L. Andreessen,
 2 Lawrence T. Babbio, Sari M. Baldauf, Rajiv L. Gupta, John H. Hammergren, Joel Z. Hyatt, John R.
 3 Joyce, Robert L. Ryan, Lucille S. Salhany and G. Kennedy Thompson (the “Director Defendants”),
 4 present or former directors of nominal defendant Hewlett-Packard Company (“HP” or the
 5 “Company”), for breach of fiduciary duty based an alleged failure of oversight where the
 6 Complaint fails to plead facts demonstrating that the Director Defendants (i) did not implement
 7 adequate reporting and compliance procedures to prevent employee misconduct at HP, or (ii) ever
 8 knowingly, consciously or in bad faith disregarded those compliance and reporting procedures.

9
 10
 11 2. Whether the Complaint fails to state a cause of action for breach of fiduciary duty
 12 against the Director Defendants based on the allegedly excessive compensation paid to former HP
 13 CEO Mark Hurd, where the Complaint does not contain specific factual allegations overcoming the
 14 presumption of the exercise of business judgment by the HP Board in setting the level of Hurd’s
 15 compensation.

16
 17 3. Whether the Complaint fails to state a cause of action against the Director Defendants
 18 for unjust enrichment based on their receipt of director fees, where the Complaint does not plead
 19 facts showing that the Director Defendants failed to provide any services to HP and where HP was
 20 contractually obligated to pay the Director Defendants fees for their board service.

PRELIMINARY STATEMENT

21 The Director Defendants respectfully submit this motion to dismiss the Verified
 22 Shareholder Derivative Complaint (the “Complaint”) filed by plaintiff Saginaw Police and Fire
 23 Pension Fund (“Plaintiff”). For the reasons articulated in the motion to dismiss concurrently filed
 24 by nominal defendant HP, in which the Director Defendants join, the Complaint should be
 25 dismissed because Plaintiff failed to make a demand on HP’s Board prior to commencing this
 26 litigation and has failed to plead particular facts excusing demand, as required by Federal Rule of
 27 Civil Procedure 23.1. The Director Defendants file this separate motion to dismiss under Federal
 28 Rule of Civil Procedure 12(b)(6) to demonstrate that the Complaint should be dismissed with

1 prejudice for the additional reason that Plaintiff fails to plead facts sufficient to state any cause of
 2 action against the Director Defendants.

3 This case is an improper hindsight attack by a shareholder upon a board of directors'
 4 discretion to manage the business affairs of a corporation in accord with the business judgment rule,
 5 which operates as a legal presumption that the Director Defendants acted on an informed basis, in
 6 good faith and in the honest belief that the action taken was in the best interests of the Company.
 7 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Plaintiff asserts that the Director Defendants
 8 lost the protection of the business judgment rule by breaching their fiduciary duty in two ways.
 9 First, it claims that the Director Defendants failed to oversee adequately HP employees'
 10 compliance with HP's legal obligations (a) in the procurement of contracts with the United States
 11 Government for the sale of equipment and services and (b) in the alleged payment of bribes by HP
 12 employees to Russian officials in 2001 to 2006. Plaintiff claims that as a result of this alleged
 13 failure HP employees exposed HP to liability for violations of the False Claims Act, the Anti-
 14 Kickback Act, the Truth in Negotiations Act and the Foreign Corrupt Practices Act ("FCPA").
 15 Second, Plaintiff claims that the Director Defendants should not have authorized compensation
 16 payments to defendant Mark Hurd, HP's former CEO, during the period Hurd allegedly allowed
 17 HP employees to violate federal law. Neither theory states a claim under Delaware law.¹

18 Plaintiff does not allege that the Director Defendants participated in any of the alleged
 19 violations of law or knew of the alleged violations at the time they were occurring. Instead,
 20 Plaintiff asserts a failure of oversight claim, known as a "Caremark claim" after the leading case of
 21 In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959 (Del. Ch. 1996). This claim suffers from an
 22 insurmountable obstacle. To hold directors personally liable for damages for the conduct of
 23 employees that allegedly harmed the corporation, Plaintiff must allege facts demonstrating that the
 24 directors utterly failed to implement a reporting or information system or, if implemented,
 25 consciously failed to monitor or oversee its operations. In other words, liability requires that the
 26 directors knew they were not discharging their fiduciary duties. For this reason, a Caremark claim

27
 28 ¹ The substantive law of Delaware applies because HP is a Delaware corporation. In re
Silicon Graphics Inc. Securities Litig., 183 F.3d 970, 990 (9th Cir. 1999).

1 “is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a
 2 judgment.” Caremark, 698 A.2d at 967.

3 Plaintiff does not come close to pleading the facts required to establish a Caremark claim.
 4 Although Plaintiff alleges that HP paid \$55 million to the Government to settle claims with respect
 5 to domestic contracting policies, Plaintiff overlooks that in the stipulated settlement agreement
 6 attached to the Complaint HP specifically disclaimed any liability. Indeed, the Complaint admits
 7 that, far from ignoring its oversight responsibility, once the HP Board was informed of the
 8 Government’s allegations with respect to HP’s domestic contracting practices, it did exactly what a
 9 prudent and cautious board should do if confronted with this information: it immediately engaged
 10 outside experts to investigate the claims. (Compl. ¶84.) Similarly, with respect to the FCPA
 11 claims concerning alleged bribes paid in Russia, which was first brought to the Director
 12 Defendants’ attention in December 2009, investigations by government authorities in Germany,
 13 Russia and the United States are ongoing and there has been no finding of wrongdoing by HP.
 14 Plaintiff admits that HP is cooperating with those investigations. Plaintiff cannot state a Caremark
 15 claim by relying solely on the inference that because HP employees allegedly engaged in
 16 misconduct, the Director Defendants must be responsible. Such a theory simply ignores the reality
 17 that a director cannot be expected to know everything that each of 300,000 employees in a
 18 multinational corporation is doing in real time.

19 Not only does Plaintiff fail to plead facts establishing a conscious disregard of oversight
 20 duties by the HP Board, but Plaintiff also pleads itself right out of any Caremark claims. The
 21 Complaint details the extensive reporting and compliance procedures HP adopted to prevent
 22 employee misconduct and to bring such misconduct to the Board’s attention. Plaintiff’s Complaint
 23 notes that HP had a written policy in place, known as its Standards of Business Conduct (“SBC”),
 24 that explicitly prohibited the payment of bribes or kickbacks, which is the very type of employee
 25 misconduct alleged here. The Complaint also notes that the HP Board received regular reports
 26 from at least two different senior management committees regarding employee compliance with
 27 HP’s business conduct standards, but fails to allege that any member of these committees ever
 28 informed the Board of any potential issues or “red flags” regarding HP’s compliance with proper

1 contracting practices domestically or in Russia. Finally, the Complaint acknowledges that the
 2 Board's Audit Committee, made up of outside directors, is responsible for overseeing HP's
 3 compliance with its SBC. Plaintiff does not allege that the Audit Committee failed to hold
 4 meetings or otherwise ignored this obligation.

5 Plaintiff also asserts that the Director Defendants breached their fiduciary duties by
 6 overcompensating HP's former CEO Hurd and that the Board was unjustly enriched through the
 7 receipt of director fees. Both of these claims are meritless and should be dismissed. Plaintiff's
 8 assertion that the HP Board overcompensated Hurd fails because officer compensation is a decision
 9 protected by the business judgment rule. Plaintiff fails to plead any facts that would overcome this
 10 strong presumption that the HP Board acted properly in setting Hurd's compensation. Plaintiff also
 11 fails to plead any facts sufficient to overcome the limited liability provisions of HP's charter
 12 provision adopted under Section 102(b)(7) of the Delaware General Corporation law. That charter
 13 provision shields directors from liability for monetary damages except for acts committed in bad
 14 faith or in breach of the directors' duty of loyalty, neither of which is alleged here. Finally, the
 15 unjust enrichment claim fails because HP was contractually obligated to pay fees to its directors
 16 and Plaintiff fails to plead any facts showing that the Director Defendants did not provide services
 17 to HP in return for those fees.

18 **I. STATEMENT OF FACTS.**²

19 **A. The Parties.**

20 **1. Nominal Defendant HP.**

21 Nominal defendant HP is a corporation organized and existing under the laws of the State
 22 of Delaware. (Compl. ¶18.) HP is a global provider of products, technologies, software, solutions
 23

24 These facts are taken from the well pleaded allegations of the Complaint, which the Court
 25 must accept as true. The Court is not required to assume the truth of legal conclusions or
 26 unwarranted factual inferences. See In re VeriFone Sec. Litig., 11 F.3d 865, 868 (9th Cir. 1993).
 27 The Court may also consider documents submitted in support of the motion that are referenced in
 28 the Complaint, even if not physically attached to the pleading, as well as matters that may be
 judicially noticed. Silicon Graphics, 183 F.3d at 986; In re Stac Elecs. Sec. Litig., 89 F.3d 1399,
 1405 n.4 (9th Cir. 1996) (considering full text of prospectus, including portions not mentioned in
 the complaint); see also Rudolph v. UTStarcom, 560 F. Supp. 2d 880, 887 (N.D. Cal. 2008)
 ("Under certain circumstances, the court may also consider matters that are appropriate subjects of
 judicial notice under Federal Rule of Evidence 201.").

1 and services to individual consumers and businesses. (*Id.*) HP's shares are traded on the New
 2 York Stock Exchange. (*Id.* ¶18.) As is the case with many publicly-traded Delaware corporations,
 3 HP has adopted a charter provision under Section 102(b)(7) of the Delaware General Corporation
 4 Law exculpating its directors from liability for monetary damages for any alleged breaches of the
 5 fiduciary duty of care. (Horvath Decl. Ex. B, at Art. X.A.)

6 **2. The Outside Directors of HP.**

7 Defendants Andreessen, Babbio, Baldauf, Gupta, Hammerngren, Hyatt, Joyce, Ryan,
 8 Salhany and Thompson (the "Director Defendants") comprised HP's Board of Directors when the
 9 Complaint was filed on October 19, 2010. (Compl. ¶¶19-29.) Each of the Director Defendants has
 10 not been employed by HP and has been independent under NYSE listing standards. (Horvath Decl.
 11 Ex. A, at 17-18.) Four of these directors – Andreessen, Gupta, Hyatt and Joyce – joined the HP
 12 Board in or after 2007, after the alleged payment of bribes by three HP employees to Russian
 13 governmental officials alleged in the Complaint. (Compl. ¶¶10, 19, 22, 24 & 25.) The Complaint
 14 alleges that each Director Defendant was compensated for his or her service on the HP Board. (*Id.*
 15 ¶¶19-28.)

16 **3. Mark Hurd.**

17 Defendant Mark Hurd served as HP's Chief Executive Officer from 2005 until his
 18 resignation in August 2010. (Compl. ¶34.) Hurd also served as Chairman of HP's Board of
 19 Directors from September 2006 until August 2010. (*Id.*) HP grew during Hurd's tenure as CEO.
 20 For the fiscal year ending October 31, 2005, HP had 150,000 employees, net revenue of \$86.696
 21 billion and net earnings of \$2.398 billion. (Horvath Decl. Ex. C at 15, 31 & 34.) For the fiscal
 22 year ending October 31, 2010, HP had grown to 324,600 employees, net revenue increased to
 23 \$126.033 billion and net earnings increased by more than 350% to \$8.761 billion. (Horvath Decl.
 24 Ex. D at 15 & 35.) HP's stock price also increased during Hurd's tenure, as demonstrated by HP's
 25 market capitalization increasing from approximately \$57.3 billion on March 28, 2005, the day
 26 before Hurd joined HP, to approximately \$108.2 billion on August 5, 2010, the day before Hurd's
 27 separation from HP was announced. (See Horvath Decl. ¶¶10 & 11 and Exs. E, F, G & H.)

28

1 **B. Plaintiff's Complaint Establishes That HP Had Extensive Reporting And**
 2 **Compliance Procedures To Protect Against Employee Misconduct.**

3 Although Plaintiff seeks to hold the Director Defendants liable for the alleged misconduct
 4 of HP personnel under a theory that the Director Defendants disregarded their oversight duties,
 5 Plaintiff's Complaint actually details the extensive procedures in place at HP to prevent employee
 6 misconduct and bring any misconduct to the Board's attention. As explained in the Complaint, HP
 7 has a written code of conduct, the SBC. (Compl. ¶¶47-50.) The SBC explicitly states that HP
 8 employees must not "offer or provide bribes or kickbacks to win business or to influence a business
 9 decision – anywhere on anything." (Id. ¶49.) Plaintiff also admits that the Board has adopted
 10 Corporate Governance Guidelines, which among other things states that "The Board also expects
 11 directors, officers and employees to acknowledge their adherence to the Standards of Business
 12 Conduct on an annual basis." (Id. ¶¶51 & 53.)

13 HP's Board also received regular reports regarding ethics and compliance issues from two
 14 separate management committees, consisting of some of HP's most senior officers. For example,
 15 HP's Board received annual and semi-annual reports from an Ethics and Compliance Committee.
 16 (Compl. ¶54.) The Ethics and Compliance Committee consisted of a Chief Ethics and Compliance
 17 Officer, the Controller, the Executive Vice President of Human Resources, the General Counsel,
 18 the CFO and at least one senior executive liaison to a business unit. (Id.) One of the Ethics and
 19 Compliance Committee's responsibilities is overseeing compliance with applicable laws and
 20 regulations. (Id.) Nowhere does Plaintiff allege that the Ethics and Compliance Committee, or any
 21 member of that committee, either during one of its annual or semi-annual reports to the Board, or at
 22 any other time, informed the Director Defendants that:

- 23 • HP had compliance issues with respect to its domestic contracting practices with
 24 the United States Government prior to 2007; or
- 25 • Prior to December 2009, HP had FCPA compliance issues with respect to its
 26 contracting practices in Russia (or anywhere else).

27 In addition to receiving reports from the Ethics and Compliance Committee, HP's Board
 28 also received semi-annual and annual reports from HP's Compliance Committee. (Compl. ¶55.)

1 The Compliance Committee, like the Ethics and Compliance Committee, is not staffed with low-
 2 level managers with little or no authority, but instead consists of high ranking HP executives.
 3 Members of the Compliance Committee include the Chief Ethics and Compliance Officer, the
 4 Chief Privacy Officer, the VP of Internal Audit, the Deputy GC for Corporate and Securities M &
 5 A, the Director of Compliance and liaisons between the Compliance Council and HP's business
 6 units. (*Id.*) Plaintiff fails to allege that any member of the Compliance Committee, either during
 7 one of its annual or semi-annual reports to the Board, or at any other time, informed the Director
 8 Defendants that HP might have compliance issues with respect to its domestic contracting practices
 9 with the United States Government prior to 2007 or FCPA compliance issues with respect to its
 10 contracting practices in Russia (or anywhere else).

11 As Plaintiff admits, the HP Board's Audit Committee, consisting entirely of outside
 12 directors, monitors the internal controls and compliance procedures HP put in place. (Compl. ¶¶30
 13 & 56-57.) According to the Audit Committee's Charter, the Audit Committee "will review the
 14 adequacy and effectiveness of HP's internal controls," (*id.* ¶56) and "will oversee HP's ethics and
 15 compliance programs with respect to legal and regulatory requirements, and review with
 16 management and the Director of Internal Audit the results of their review of compliance with
 17 applicable laws, regulations and listing standards [and] HP's Standards of Business Conduct. . . ." (Id. ¶57.) Plaintiff does not contend that the Audit Committee failed to meet or otherwise failed to
 18 undertake the responsibilities assigned to it by its Charter.

20 C. **Plaintiff's Allegations Regarding Alleged Misconduct Relating To Contracts**
 21 **With The United States Government.**

22 1. **The Rille Actions.**

23 According to Plaintiff's Complaint, in late 2006/early 2007, the United States Government
 24 notified HP of the fact that certain *qui tam* plaintiffs had alleged that HP and other entities had
 25 engaged in domestic contracting practices with the federal government that allegedly violated
 26 various federal statutes, including the False Claims Act, the Anti-Kickback Act and Truth in
 27 Negotiations Act. (Compl. ¶¶84-85.) (These *qui tam* actions are referred to in this document as the
 28 "Rille Actions.") Plaintiff does not allege that HP or any member of its Board was ever made

1 aware of any potential False Claim Act, Anti-Kickback Act or Truth in Negotiations Act violations
 2 prior to the Government informing HP of the allegations being made by the Rille plaintiffs.
 3 Plaintiff also does not allege that HP had any prior compliance issues that would put HP's Board
 4 on notice that HP might have legal issues with its contracting practices with the United States
 5 Government.

6 According to Plaintiff's Complaint, in April 2007, the United States filed a Complaint in
 7 Intervention in the Rille Actions alleging False Claims Act and Anti-Kickback Act claims against
 8 HP. (Compl. ¶85.) Plaintiff alleges that the Government asserted that HP and other information
 9 technology vendors formed improper "alliances" with technology "systems integrators," such as
 10 Accenture LLP, which had been retained by the Government to advise it regarding the selection of
 11 information technology vendors to provide products and services. (Id. ¶67.) The Government
 12 alleged that HP paid fees, in the form of referral fees, commissions and free or discounted products
 13 and services, to these systems integrators when the Government awarded contracts to HP at the
 14 recommendation of the systems integrator and that such payments were unlawful. (Id. ¶¶68-69.)

15 Plaintiff also alleges that the Rille plaintiffs asserted that Hurd was personally involved in
 16 the various contracting programs under which systems integrators were paid improper fees, both in
 17 his prior role as an executive of NCR and later as HP's CEO. (Compl. ¶¶83-84.) Plaintiff does not
 18 allege that Hurd ever brought these alleged practices to the attention of the Director Defendants at
 19 any time. Plaintiff also does not allege that the existence of such practices was ever brought to the
 20 attention of the Director Defendants by any other person or entity prior to the time the Government
 21 informed HP of the allegations sometime in late 2006/early 2007. Indeed, Plaintiff appears to
 22 contend that some of the Defendant Directors learned of the allegations in the Rille Actions
 23 through HP's filings with the SEC in June 2007 and December 2007 – well after the alleged
 24 misconduct prompting the Rille Actions occurred. (Id. ¶88.)

25 **1. The HP Board responds to the Government's allegations.**

26 The Complaint demonstrates that immediately after the Government informed HP of the
 27 allegations of the Rille plaintiffs, the HP Board did exactly what a prudent Board would do in those
 28 circumstances. In February 2007, HP informed the Government that it had retained outside

1 consultants to investigate HP's contracting practices. (Compl. ¶¶84-85.) Nowhere does Plaintiff
 2 allege that these consultants ever informed the Director Defendants of potential compliance
 3 problems on HP contracts anytime during the 2002 to 2007 time period. Plaintiff also does not
 4 allege that the Director Defendants ever ignored any advice from these consultants regarding HP's
 5 compliance systems or contracting practices.

6 HP settled the claims in the Rille Actions with the Government in August 2010, prior to any
 7 trial or other adjudication of those claims. (Compl. Ex. A. ¶8.) That settlement agreement,
 8 attached to the Complaint, contained a paragraph indicating that the Government contended that
 9 HP had violated federal law with respect to government contracts in the 2002-09 timeframe, *but*
 10 *also a paragraph indicating that HP was not admitting liability with respect to any of the*
 11 *Government's contentions and that "[n]either this Settlement Agreement, its execution, nor the*
 12 *performance of any obligation under it, including any payment, is intended to be, or shall be*
 13 *understood as, an admission of liability or wrongdoing, or other expression reflecting upon the*
 14 *merits of the dispute by HP."* (Id., Ex. A ¶¶D & E.) (emphasis added.) To date, there has never
 15 been any finding by any court that HP employees engaged in the violations asserted by the Rille
 16 plaintiffs.

17 **D. Plaintiff's Allegations Regarding Alleged Violations Of The FCPA By HP**
 18 **Personnel.**

19 Plaintiff alleges that HP learned in December 2009 that personnel at a former HP German
 20 subsidiary had been arrested by German and Swiss authorities for allegedly paying bribes to certain
 21 Russian officials from 2001 through 2006 in connection with the procurement of a contract in
 22 Russia. (Compl. ¶¶10, 95, 97-98 & 101.) Plaintiff does not allege that the Director Defendants
 23 were ever aware of any alleged FCPA violations by HP personnel prior to December 2009.
 24 Plaintiff also does not allege any facts suggesting that the Director Defendants should have been
 25 aware of any potential FCPA compliance issues prior to the arrest of these individuals in December
 26 2009. HP publicly disclosed in September 2010 the Government's investigation into the
 27 allegations of potential FCPA violations and, as Plaintiff admits, HP is cooperating with that

28

1 investigation. (Id. ¶¶101-103.) To date, there has not been any finding by any court that HP
 2 employees violated the FCPA with respect to this contract.

3 **ARGUMENT**

4 **I. STANDARD ON A MOTION TO DISMISS.**

5 The standard for granting a motion to dismiss under Federal Rule of Civil Procedure
 6 12(b)(6) is settled: a complaint must be dismissed if it fails to plead “enough facts to state a claim
 7 to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).
 8 Moreover, the alleged facts “must be enough to raise a right to relief above the speculative level.”
 9 Id., 550 U.S. at 555. While all material allegations in a complaint must be accepted as true, the
 10 Court need not accept wholly conclusory allegations and “a formulaic recitation of the elements of
 11 a case of action will not do.” Id. This last admonition has particular relevance here, where the
 12 Complaint eschews factual allegations in favor of unsupported conclusory allegations and
 13 inferences that are not permitted by applicable law.

14 **II. THE COMPLAINT FAILS TO PLEAD FACTS SHOWING THAT THE
 15 DIRECTOR DEFENDANTS CONSCIOUSLY DISREGARDED HP'S AFFAIRS.**

16 Delaware law sets a high bar for a plaintiff seeking to plead claims against a corporate
 17 board based on an alleged breach of its duty to oversee the corporation’s affairs. Plaintiff’s
 18 oversight claims are based upon two separate and distinct acts of alleged misconduct by HP
 19 employees: (i) allegations of misconduct regarding contracts with the US Government in the 2002
 20 to 2009 timeframe, and (ii) allegations of alleged FCPA violations by employees of a former HP
 21 subsidiary with respect to a contract in Russia from 2001 to 2006. (Compl. ¶¶9-10, 101, 105, 106
 22 & 109.) Importantly, the Complaint does not allege that any Director Defendant personally
 23 participated in this alleged misconduct. (Id.) For example, there is no allegation that any director
 24 personally submitted a false claim to the United States government or personally bribed a Russian
 25 official. (Id.) Instead, the Complaint makes conclusory allegations that the Director Defendants
 26 consciously allowed this misconduct to occur. (Id. ¶¶1, 8-11, 105-106 & 109.) These allegations

27

28

1 are insufficient to state a claim against the Director Defendants for breach of their oversight duties
 2 with respect to both instances of alleged misconduct.³

3 A Caremark claim is a type of *non-feasance* claim in which a shareholder plaintiff alleges
 4 that a board of directors failed in its general duty to monitor the corporation's affairs, permitting
 5 others to engage in misconduct. Caremark claims cannot be premised on negligence, recklessness
 6 or the general allegation that the board was merely "asleep at the switch," but instead require a
 7 showing of a *conscious* abdication of duties. Desimone v. Barrows, 924 A.2d 908, 940 (Del. Ch.
 8 2007) (Caremark liability requires a complaint to allege facts showing that directors knew they
 9 were not discharging their duties).

10 The Delaware Supreme Court has stated that a Caremark claim exists only if the
 11 allegations show "(a) the directors *utterly failed* to implement any reporting or information system
 12 or controls; or (b) having implemented such a system or controls, *consciously failed to monitor* or
 13 oversee its operations thus disabling themselves from being informed of risks or problems
 14 requiring their attention. In either case, imposition of liability requires a showing that *the directors*
 15 *knew that they were not discharging their fiduciary obligations.*" Stone ex rel. AmSouth
 16 Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (emphasis added). This two-pronged
 17 standard promotes the valuable goal of Delaware law that makes "board service by qualified
 18 persons more likely, while continuing to act as a stimulus to *good faith performance of duty* by
 19 such directors." Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003).

20

21

22 ³ The claims against Director Defendants Andreessen, Gupta, Joyce and Hyatt regarding the
 23 alleged FCPA violations are deficient on their face for an additional reason. Hyatt and Joyce
 24 joined the HP Board in 2007 and Andreessen and Gupta joined the HP Board in 2009. (Compl.
 25 ¶¶19, 22 & 24-25.) However, Plaintiff alleges that the FCPA violations occurred in connection
 26 with a transaction that spanned 2001 through 2006 between a former HP German subsidiary and
 27 the Russian government. (*Id.* ¶¶10, 95 & 101.) Director Defendants Andreessen, Gupta, Hyatt and
 28 Joyce therefore face no liability for the alleged FCPA violations which occurred before they joined
 the HP Board. See, e.g., In re Intel Corp. Deriv. Litig., 621 F. Supp. 2d 165, 175 (D. Del. 2009)
 (directors did not face liability for Caremark claim based on purported employee misconduct
 occurring years before nine defendants joined the Intel board); Kanter v. Barella, 388 F. Supp. 2d
 474, 480 (D.N.J. 2005), aff'd, 489 F.3d 170 (3d Cir. 2009) (dismissing Caremark claim for failure
 to establish a substantial likelihood of director liability to excuse pre-suit demand where complaint
 acknowledged at least three defendants were not directors when the challenged conduct occurred).

1 **A. Plaintiff Fails To Establish That Any Underlying Employee Misconduct Even**
 2 **Occurred.**

3 As a preliminary matter, Plaintiff's Complaint fails to establish that any underlying
 4 misconduct by HP employees has occurred. With regard to the Rille Actions, Plaintiff fails to
 5 bring to the Court's attention that HP specifically disclaimed any liability or wrongdoing. (Compl.
 6 Ex. A at 2-3.) Moreover, as Plaintiff admits in the Complaint (*id.* ¶¶100-103), the allegations
 7 regarding FCPA violations by employees of a former HP subsidiary are still in the nascent
 8 investigatory stage. Thus, there has been no finding that HP employees have even engaged in the
 9 wrongdoing alleged in the Rille Actions or in any FCPA violations.

10 As demonstrated below, even assuming that HP employees have violated federal law, that
 11 would not in any way establish a Caremark claim against HP's directors. Plaintiff's Caremark
 12 claims are however especially weak and misguided in light of the fact that no underlying violation
 13 of law has been established. See In re Intel, 621 F. Supp. 2d at 175 (allegations regarding an
 14 ongoing governmental investigation "contribute little, if anything, towards establishing that the
 15 Directors now face a 'substantial likelihood' of liability for having" failed to exercise their
 16 oversight duties).

17 **B. The Complaint Demonstrates That HP's Board Had Extensive Reporting And**
 18 **Compliance Procedures In Place.**

19 The Complaint does not plead facts satisfying the first prong of a Caremark claim: that the
 20 Director Defendants failed to implement internal controls at HP. Indeed, the Complaint admits the
 21 opposite. The Complaint alleges that HP has a written code of conduct, the SBC, that explicitly
 22 prohibits bribery. (Compl. ¶¶47-49.) HP also had in place various committees that regularly
 23 reported to the Board regarding ethics and compliance issues at HP. These included annual and
 24 semi-annual reports from an Ethics and Compliance Committee consisting of a Chief Ethics and
 25 Compliance Officer, the Controller, the Executive Vice President of Human Resources, the
 26 General Counsel, the CFO and at least one senior executive liaison to a business unit. (*Id.*) The
 27 Board also received semi-annual and annual reports from HP's Compliance Committee, a separate
 28 committee consisting of the Chief Ethics and Compliance Officer, the Chief Privacy Officer, the

1 VP of Internal Audit, the Deputy GC for Corporate and Securities M & A, the Director of
 2 Compliance and liaisons between the Compliance Council and HP's business units. (*Id.* ¶55.)

3 The Complaint therefore fails to state a Caremark claim on the basis that the directors
 4 "utterly failed to implement any reporting or information system or control." Stone, 911 A.2d at
 5 370. As courts have frequently held, a Caremark claim cannot be premised on a failure to
 6 implement a system of controls where the Complaint concedes the existence of such a system, as
 7 well as policies meant to deter employee wrongdoing. See Stone, 911 A.2d at 371-72 (Caremark
 8 claim could not "withstand a motion to dismiss" where board had policies and procedures in place
 9 regarding compliance with the Bank Secrecy Act); see also In re Dow Chem. Co. Deriv. Litig., Civ.
 10 A. No. 4349, 2010 WL 66769, *13 n.85 (Del. Ch. Jan. 11, 2010) (plaintiffs could not state a
 11 Caremark claim against Dow's directors for alleged bribes paid by Dow where Dow had a code of
 12 ethics prohibiting bribes).

13 **C. The Complaint Fails To Plead Facts Showing That The Director Defendants**
Consciously Failed To Monitor Or Oversee HP's Operations.

15 By conceding HP had internal controls, Plaintiff faces the even more difficult task of
 16 pleading facts satisfying the second prong of a Caremark claim: that the Director Defendants
 17 *consciously* failed to monitor those internal controls or failed to act in the face of known "red
 18 flags." Stone, 911 A.2d at 370 (where controls have been implemented, Caremark claim requires a
 19 showing that directors "*consciously failed to monitor* or oversee its [the Company's] operations").
 20 But Plaintiff has not pled any facts showing the Director Defendants consciously failed to monitor
 21 or oversee HP's extensive internal controls. Moreover, Plaintiff has not identified *any* red flags
 22 that were presented to the Director Defendants, much less red flags that they consciously ignored.

23 The Delaware Supreme Court's opinion in Stone is instructive. In Stone, the court affirmed
 24 the dismissal of a shareholder derivative claim for failure to make demand on the board predicated
 25 on allegations that the AmSouth Board failed in its oversight obligations, where AmSouth incurred
 26 \$40 million in government fines for employee violations of the Bank Secrecy Act ("BSA") and a
 27 \$10 million civil penalty for operating an inadequate anti-money-laundering ("AML") program. *Id.*
 28 at 365-66. The court noted that, even though violations of law occurred, the directors had

1 established an information and reporting system that “was designed to permit the directors to
 2 periodically monitor AmSouth’s compliance with BSA and AML regulations.” Id. at 371-72. The
 3 court held that, “[i]n the absence of red flags, good faith in the context of oversight must be
 4 measured by the directors’ actions to ‘assure a reasonable information and reporting system exists’
 5 and not by second-guessing after the occurrence of employee conduct that results in an unintended
 6 adverse outcome.” Id. at 373 (quoting Caremark, 698 A.2d at 967-68, 971). “The lacuna in the
 7 plaintiffs’ argument is a failure to recognize that the directors’ good faith exercise of oversight
 8 responsibility may not invariably prevent employees from violating criminal laws, or from causing
 9 the corporation to incur significant financial liability, or both, as occurred in Graham, Caremark
 10 and this very case.” Id. See also In re Dow, 2010 WL 66769, at *13 (Caremark claim could not be
 11 supported against Dow’s directors even where plaintiff pled sufficient facts establishing that Dow’s
 12 employees paid illegal bribes); Midwestern Teamsters Pension Trust Fund v. Baker Hughes Inc.,
 13 No. H-08-1809, 2009 WL 6799492, at *8 (S.D. Tex. May 7, 2009) (Caremark claims predicated on
 14 FCPA violations could not be asserted where Baker Hughes had procedures in place designed to
 15 prevent FCPA violations, including a Business Code of Conduct and an FCPA policy).

16 Just as plaintiffs failed to do in Stone, Plaintiff here does not plead facts satisfying the
 17 second Caremark prong because it “does not plead a single fact suggesting specific red – or even
 18 yellow – flags were waved at the outside directors.” Guttman, 823 A.2d at 507; see also
 19 Markewich v. Collins, 622 F. Supp. 2d 802, 811 (D. Minn. 2009) (“‘Red flags are only useful when
 20 they are either waved in one’s face or displayed so that they are visible to the careful observer.’”)
 21 (quoting Wood v. Baum, 953 A.2d 136, 143 (Del. 2008)); In re Dow, 2010 WL 66769, *13 n.85 (in
 22 attempting to state a Caremark claim, plaintiffs “cannot simultaneously argue that the Dow board
 23 ‘utterly failed’ to meet its oversight duties yet had ‘corporate governance procedures’ in place
 24 without alleging that the board failed to monitor its ethics policy or its internal procedures”).⁴ The

25 ⁴ See also In re Bidz.com, Inc. Deriv. Litig., 773 F. Supp. 2d 844, 2011 WL 759461, *8 (C.D.
 26 Cal. Feb. 24, 2011) (dismissing Caremark claim for failure to excuse demand where “[t]here is
 27 nothing suggesting that the Board was ever presented with these ‘red flags’”); In re Accuray, Inc. S’holder Deriv. Litig., 757 F. Supp. 2d 919, 928 (N.D. Cal. 2010) (plaintiffs failed to excuse
 28 demand on Caremark claim where “Plaintiffs have not alleged any specific information that each
 director knew and ignored concerning” the Company’s accounting methods); In re Intel, 621 F.
 Supp. 2d at 174 (plaintiff failed to plead that directors faced a substantial likelihood of liability for
 (cont’d)

1 Complaint's silence as to what red flags the Director Defendants knew of and ignored is fatal to
 2 Plaintiff's Caremark claim.

3 Nor can Plaintiff claim that the Director Defendants knew of, and ignored, the alleged
 4 employee misconduct merely because it may have occurred. See Desimone, 924 A.2d 908, 940
 5 (Del. Ch. 2007) ("Delaware courts routinely reject the conclusory allegation that because illegal
 6 behavior occurred, internal controls must have been deficient, and the board must have known
 7 so."). Indeed, the court in Caremark refused to equate employee wrongdoing with director liability
 8 for breach of the duty of oversight in a situation where the corporation *pled guilty to federal*
 9 *criminal acts* and paid \$250 million in criminal fines and civil penalties. Caremark, 698 A.2d at
 10 972 (noting "[t]he liability that eventuated in this instance was huge. But the fact that it resulted
 11 from a violation of criminal law alone does not create a breach of fiduciary duty by directors").
 12 Plaintiff leaves the Court to draw the inference that, merely because HP employees may have
 13 engaged in wrongful conduct and exposed HP to liability by their actions (which, unlike in
 14 Caremark, has not been admitted here), the Director Defendants must have breached their fiduciary
 15 duty. This inference is not permissible. Stone, 911 A.2d at 373 (refusing "to equate a bad outcome
 16 with bad faith").⁵

17 Plaintiff also cannot demonstrate that the Director Defendants knew of and ignored
 18 employee misconduct when that conduct occurred by claiming that the Director Defendants later
 19 knew of the allegations in the Rille Actions or the Government's investigation into alleged FCPA
 20 violations. (See Compl. ¶¶87-88 & 98.) A director's knowledge of alleged employee wrongdoing

21
 22 *(cont'd from previous page)*
 23 oversight claim where "Plaintiff fails to identify what the Directors actually knew about the 'red
 24 flags' and how they responded to them").

25 ⁵ See also Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines, 534 F.3d 779,
 26 782, 789 (D.C. Cir. 2008) (Fannie Mae directors did not face a substantial likelihood of liability for
 27 Caremark claims despite court recognition that "Fannie Mae announced one of the largest earnings
 28 restatements in U.S. history"); In re VeriFone Holdings, Inc. S'holder Deriv. Litig., Nos. C-07-
 6347 MHP, C-07-6140 MHP, 2010 WL 3385055, at *10 (N.D. Cal. Aug. 26, 2010) (directors did
 not face a substantial likelihood of liability on Caremark claims despite accounting irregularities
 that necessitated a restatement of corporation's financial results); Graham v. Allis-Chalmers,
 188 A.2d 125, 131 (Del. 1963) (upholding decision that, as a matter of law, directors could not be
 liable "merely because, unknown to [the directors], some employees . . . violated the anti-trust laws
 thus subjecting the corporation to loss").

1 after the wrongdoing occurred does not show that a director knew of and ignored that misconduct
 2 while it was occurring. See In re Intel, 621 F. Supp. 2d at 174 (complaint did not allege facts
 3 showing the directors faced a substantial likelihood of liability for knowing and ignoring alleged
 4 anti-trust violations as they were occurring where only alleged “red flag” was the directors
 5 approved later SEC filings disclosing investigations into the alleged violations).

6 It is also worth noting that the Director Defendants have been all “non-executive” or
 7 “outside” members of HP’s Board, meaning that none of them was actually a full-time employee
 8 working at HP. As explained in the seminal case in this area, “[m]ost of the decisions that a
 9 corporation, acting through its human agents, makes are, of course, not the subject of director
 10 attention. Legally, the board itself will be required only to authorize the most significant corporate
 11 acts or transactions” Caremark, 698 A.2d at 968. Given that HP is a massive global entity
 12 with hundreds of thousands of employees, it simply defies common sense to leap to the conclusion,
 13 as Plaintiff asks this Court to do, that outside board members should be held liable for allegedly
 14 illegal payments by HP employees unknown to the Director Defendants at the time they were made.

15 Finally, the Complaint fails to allege that the Board ever ignored danger signs or “red flags”
 16 indicating employee misconduct. To the contrary, the Complaint demonstrates that the HP Board
 17 promptly hired an outside consultant to launch its own investigation, (Compl. ¶84), and that the
 18 Company has chosen to cooperate with governmental investigations. (See id. ¶103.) Plaintiff does
 19 not allege what else the Board should have done in these circumstances. Plaintiff therefore fails to
 20 allege any facts showing that the Board knowingly failed to act on a potential red flag, as required
 21 in Stone. See also Pirelli, 534 F.3d at 789 (“Plaintiffs’ own allegations demonstrate[d] that the
 22 directors actually responded to each of the ‘red flags’ cited by plaintiffs” where “on each claim, the
 23 Board or its relevant committee looked into the matter and relied on internal or external accounting
 24 experts.”) (citation omitted); In re Baxter Int’l, Inc. S’holders Litig., 654 A.2d 1268, 1270 (Del. Ch.
 25 1995) (complaint failed to plead facts showing that directors faced a substantial likelihood of
 26 liability for oversight claim where, “without an allegation that wrongdoing was admitted or proven,
 27 the complaint does not plead with particularity what obvious danger signs were ignored or what
 28 additional measures the directors should have taken”).

1 Plaintiff has therefore failed to meet the legal requirements for pleading Caremark claims
 2 and the Court should dismiss the claims alleged in Count I.

3 **III. PLAINTIFF'S CLAIMS REGARDING HURD'S COMPENSATION ARE**
 4 **MERITLESS AND SHOULD BE DISMISSED.**

5 Plaintiff also alleges that the Director Defendants improperly awarded Hurd approximately
 6 \$97 million in compensation payments from 2007 through 2009. (Compl. ¶106.) Plaintiff claims
 7 that Hurd's compensation was excessive because Hurd allegedly made a conscious decision to
 8 allow HP employees to violate the False Claims Act, the Anti-Kickback Act and the FCPA. (Id.
 9 ¶109.) This allegation fails to state a claim.⁶

10 **A. Corporate Directors Have Broad Discretion To Manage Corporate Affairs And**
 11 **Enjoy Substantial Immunities Related To Their Board Service.**

12 In order to ensure that capable, qualified persons serve on corporate boards, the law
 13 provides substantial legal protections and immunities to directors when their actions are challenged
 14 by shareholders. The most well known of these is the business judgment rule, which "operates as a
 15 procedural guide for litigants and a substantive rule of law." Citron v. Fairchild Camera &
 16 Instrument Corp., 569 A.2d 53, 64 (Del. 1989).

17 First, the business judgment rule presumes that directors act "on an informed basis, in good
 18 faith and in the honest belief that the action was in the best interests of the company." Citron, 569
 19 A.2d at 64 (quoting Aronson, 473 A.2d at 812); see also In re Silicon Graphics Inc. Secs. Litig.,
 20 183 F.3d 970, 990 (9th Cir. 1999) ("Under the business judgment rule, directors are presumed to
 21 make sound business decisions, and to inform themselves properly prior to making those
 22 decisions."). This presumption automatically attaches to any "director-approved transaction within
 23 a board's conferred or apparent authority in the absence of any evidence of 'fraud, bad faith, or
 24 self-dealing in the usual sense of personal profit or betterment.'" Citron, 569 A.2d at 64 (citation
 25 omitted). To overcome this presumption, the Complaint must allege facts showing that each
 26 director breached his or her fiduciary duty of loyalty or good faith, failed to exercise due care, or

27 ⁶ As noted in footnote 3, above, Director Defendants Andreessen and Gupta joined the HP
 28 Board in 2009. (See also Compl. ¶¶19 & 22.) Accordingly, Andreessen and Gupta face no
 liability for compensation awarded to Hurd in 2007 and 2008.

1 that the challenged action constituted waste. See id. (“The burden falls on the proponent of a claim
 2 to rebut the presumption by introducing evidence either of director self-interest, if not self-dealing,
 3 or that the directors either lacked good faith or failed to exercise due care.”); see also In re Walt
 4 Disney Co. Deriv. Litig., 907 A.2d 693, 747 (Del. Ch. 2005) (“Disney I”) (“Where a plaintiff fails
 5 to rebut the presumption of the business judgment rule, she is not entitled to any remedy, be it legal
 6 or equitable, unless the transaction constitutes waste.”); Lee v. Interinsurance Exch., 50 Cal. App.
 7 4th 694, 715 (1996) (affirming grant of demurrer and noting that “in most cases, the presumption
 8 created by the business judgment rule can be rebutted only by affirmative allegations of facts
 9 which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to
 10 investigate material facts”).⁷

11 If the presumption is not overcome, then the business judgment rule acts “as a substantive
 12 rule of law, which will attach to protect the directors and the decisions they make.” Citron, 569
 13 A.2d at 64. Indeed, the business judgment rule acknowledges “that a board’s decision, otherwise
 14 properly based, could be wrong and still withstand attack. And this is as it should be.” Reading Co.
 15 v. Trailer Train Co., No. 7422, 1984 WL 8212, at *4 (Del. Ch. Mar. 15, 1984); see also Levine v.
 16 Smith, 591 A.2d 194, 207 (Del. 1991) (“If a board’s decision can be attributed to any rational
 17 business purpose, . . . a court will not substitute its judgment for that of a board.”); Gagliardi v.
 18 TriFoods Int’l Inc., 683 A.2d 1049, 1053 (Del. Ch. 1996) (the business judgment rule shields
 19 directors from liability for even “unwise,” “foolish,” or “stupid” decisions). Accordingly, a
 20 complaint’s failure to overcome the presumption of the business judgment rule mandates its
 21 dismissal. See Desimone v. Barrows, 924 A.2d 908, 928 (Del. Ch. 2007) (“[T]o survive a Rule
 22 12(b)(6) motion, a complaint alleging breach of fiduciary duty must plead facts supporting an
 23 inference of breach, not simply a conclusion to that effect.”).

24 ⁷ In this case, Plaintiff could not possibly overcome the presumption of the business
 25 judgment rule by pleading a violation of the duty of care in light of HP’s Certificate of
 26 Incorporation exculpating HP’s directors from monetary liability “[t]o the fullest extent permitted
 27 by the Delaware General Corporation Law” (Horvath Decl. Ex. B, at X.A.) This exculpation
 28 extends to and precludes a claim for a breach of the duty of care. See Lyondell Chem. Co. v. Ryan,
 970 A.2d 235, 239 (Del. 2009) (exculpatory charter provision protected directors “from personal
 liability for breaches of the duty of care”); see also Ash v. McCall, No. Civ. A. 17132, 2000 WL
 1370341, at *10 (Del. Ch. Sept. 15, 2000) (exculpatory clause justified dismissing duty of care
 claim).

1 **B. The Decision To Set Executive Compensation Is Protected By The Business**
 2 **Judgment Rule.**

3 A decision by the board of directors to award compensation to a CEO is a quintessential
 4 exercise of business judgment. Indeed, the Delaware Supreme Court has held that “[i]f an
 5 independent and informed board, acting in good faith, determines that the services of a particular
 6 individual warrant large amounts of money, whether in the form of current salary or severance
 7 provisions, the board has made a business judgment.” Grimes v. Donald, 673 A.2d 1207, 1215
 8 (Del. 1996); see also White v. Panic, 783 A.2d 543, 554 n.35 (Del. 2001) (“White I”) (a board has
 9 “broad discretion” to set CEO compensation); Pirelli, 534 F.3d at 791 (plaintiffs failed to plead
 10 facts that board of directors acted in bad faith in setting severance compensation for executives
 11 even if board had arguable grounds to terminate executives for cause); 8 Del. C. § 122(5) (“Every
 12 corporation created under this chapter shall have power to: . . . Appoint such officers and agents as
 13 the business of the corporation requires and to pay or otherwise provide for them suitable
 14 compensation.”). Accordingly, Plaintiff must plead particular facts establishing that the Director
 15 Defendants did not act loyally and in good faith in setting Hurd’s compensation. Plaintiff has
 16 failed to meet this pleading burden.

17 **1. The Director Defendants had no personal interest in the setting of**
 18 **Hurd’s compensation.**

19 Plaintiff has not pled facts showing that the Director Defendants breached their duty of
 20 loyalty in approving Hurd’s compensation. The duty of loyalty “mandates that the best interest of
 21 the corporation and its shareholders takes precedence over any interest possessed by a director,
 22 officer or controlling shareholder and not shared by the stockholders generally.” Disney I, 907
 23 A.2d at 751 (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)). Thus, the
 24 duty of loyalty is implicated “when a fiduciary either appears on both sides of a transaction or
 25 receives a personal benefit not shared by all shareholders.” Disney I, 907 A.2d at 751 (citing Cede,
 26 634 A.2d at 361).

27 Here, Plaintiff has not pled any facts showing that the Director Defendants had a personal
 28 interest in Hurd’s compensation. Plaintiff therefore has not rebutted the presumption that the

1 Director Defendants acted loyally to HP in setting Hurd's compensation. See, e.g., Disney I, 907
 2 A.2d at 751 ("The classic example that implicates the duty of loyalty is when a fiduciary either
 3 appears on both sides of a transaction or receives a personal benefit not shared by all
 4 shareholders."); In re RJR Nabisco, Inc. S'holders Litig., Civ. No. 10389, 1989 WL 7036, at *14
 5 (Del. Ch. Jan. 31, 1989) (finding no breach of the duty of loyalty where directors had no personal
 6 interest in the challenged transaction).

7 2. **Plaintiff has failed to rebut the presumption that the Director**
 8 **Defendants acted in good faith in setting Hurd's compensation.**

9 Because there is no doubt that the Director Defendants were disinterested in setting Hurd's
 10 compensation, Plaintiff must make a "strong showing" that the Director Defendants failed to act in
 11 good faith.⁸ See In re Lear Corp. S'holder Litig., 967 A.2d 640, 653-654 (Del. Ch. 2008) ("[O]ur
 12 Supreme Court has held that to hold a disinterested director liable for a breach of the fiduciary duty
 13 of loyalty for acting in bad faith, a strong showing of misconduct must be made.") (citing In re
 14 Walt Disney Co. Deriv. Litig., 906 A.2d 27, 67 (Del. 2006) ("Disney II")). To make such a strong
 15 showing, Plaintiff must plead facts demonstrating that the Director Defendants "knowingly and
 16 completely failed to undertake their responsibilities." Lyondell Chem., 970 A.2d at 243-244; see
 17 also Disney II, 906 A.2d at 67 (a director acts in bad faith by, for example, "intentionally acting
 18 with a purpose other than that of advancing the best interests of the corporation, ... [or]
 19 intentionally fail[ing] to act in the face of a known duty to act, *demonstrating a conscious*
 20 *disregard for his duties*") (emphasis in original).

21 Not only does Plaintiff fail to plead facts showing that the Director Defendants acted
 22 improperly in setting Hurd's compensation, Plaintiff admits that Hurd's compensation in 2007,
 23 2008 and 2009 was based on HP's "superior financial results, as well as significant achievement
 24 on a broad range of non-financial goals, including strategic acquisitions, talent management and

25

 26 8 What is colloquially referred to as the "duty of good faith" does not establish an
 27 independent fiduciary duty and is actually "a subsidiary element, a condition, of the fundamental
 28 duty of loyalty." See Stone, 911 A.2d at 369-370 (internal quotations and alterations in original
 omitted). Accordingly, to comply with his or her duty of loyalty, a director must also act in the
 good faith belief that his or her "actions are in the corporation's best interest." Id. at 370 (citation
 omitted).

1 succession planning.” (Compl. ¶¶38-40) (emphasis added.) This is illustrated by HP’s growth in
 2 employees, net revenue, net earnings and market valuation. See above at 5:19-27.

3 Plaintiff ignores these results and attempts to argue that the Director Defendants should not
 4 have compensated Hurd so highly because they allegedly knew, based on the allegations in the
 5 Rille Actions, that Hurd made a “conscious decision to allow HP employees to violate” the False
 6 Claims Act, the Anti-Kickbacks Act and the FCPA. (Compl. ¶¶83 & 109(a).) But this argument
 7 misses the mark for two reasons. First, the reference to Hurd in the Rille Actions concerned
 8 actions by Hurd when he was at vice-president in marketing at NCR Corporation, not when he was
 9 at HP. (Id. ¶83.) Second, even if the allegation in the Rille Actions about messages Hurd sent
 10 while at NCR raised a cloud as to his potential liability, that does not in any way diminish that the
 11 Court’s “deference to directors’ business judgment is particularly broad in matters of executive
 12 compensation.” White v. Panic, 793 A.2d 356, 369 (Del. Ch. 2000) (“White II”), *aff’d*, 783 A.2d
 13 543, 553 (Del. 2001) (citation omitted). In White v. Panic, the plaintiff challenged the decision by
 14 the board of directors of ICN Pharmaceuticals to award Milan Panic, ICN’s CEO, a \$1.8 million
 15 bonus at the same time Panic and ICN faced liability for Panic’s alleged sexual harassment of
 16 ICN’s employees. White II, 793 A.2d at 360-62. The plaintiff in White alleged that this bonus
 17 condoned and encouraged Panic’s misconduct. Id. at 363. The Chancery Court rejected this
 18 allegation, holding that absent an allegation of actual fraud in the award of Panic’s bonus, the
 19 business judgment rule precluded the court from second-guessing the broad discretion of the board
 20 of ICN to set Panic’s compensation. Id. at 369. The same result follows here, and the Court
 21 should dismiss the claims regarding Hurd’s compensation in Count I.

22 **IV. PLAINTIFF’S UNJUST ENRICHMENT CLAIM IS MERITLESS.**

23 Plaintiff asserts that the Director Defendants were unjustly enriched due to the
 24 compensation they received for their services as directors of HP while they allegedly breached their
 25 fiduciary duties. (See Compl. ¶¶12, 13 & 118-119.) This claim fails in the first instance because,
 26 for the reasons discussed above, Plaintiff has not pled facts showing the Director Defendants
 27 breached their fiduciary duties to HP. This claim fails for the additional reason that Plaintiff has
 28 not properly alleged an unjust enrichment claim.

1 To adequately plead a claim for unjust enrichment under Delaware law, Plaintiff's
 2 Complaint must allege facts showing: "(1) an enrichment, (2) an impoverishment, (3) a relation
 3 between the enrichment and the impoverishment, (4) the absence of justification, and (5) the
 4 absence of a remedy provided by law." Accuray, 757 F. Supp. 2d at 935; see also Sherman v.
 5 Ryan, 911 N.E.2d 378, 399 (Ill. App. Ct. 2009) (same); Total Care Physicians, P.A. v. O'Hara, No.
 6 Civ. A. 99C-11-201-JRS, 2002 WL 31667901, at *10 (Del. Super. Ct. Oct. 29, 2002) (same).
 7 Rather than allege any *facts* showing each of these five elements, the Complaint insufficiently
 8 alleges "[b]y their wrongful acts and omissions, the Director Defendants were unjustly enriched at
 9 the expense of and to the detriment of HP." (Compl. ¶118.)

10 Sherman is instructive. There, Patrick Ryan and Michael O'Halleran, two members of the
 11 board of directors of Aon Corporation, allegedly engaged in securities fraud on behalf of Aon and
 12 were unjustly enriched by the "'profits, benefits, and other compensation' they obtained from their
 13 wrongful conduct." Sherman, 911 N.E.2d at 399 (citation omitted). The court held that this bald
 14 allegation was insufficient to state a claim for unjust enrichment where the complaint did not allege,
 15 "even in a conclusory fashion, the absence of justification and the absence of a remedy provided by
 16 law, two essential elements of a claim for unjust enrichment." Id. Although plaintiffs claimed that
 17 Ryan and O'Halleran were unjustly "paid substantial salaries and bonuses while Aon engaged in
 18 conduct that caused it to sustain more than \$228 million in settlements," plaintiffs failed to allege
 19 that "Ryan and O'Halleran *performed no work in exchange for their compensation.*" Id. (emphasis
 20 added). Accordingly, plaintiffs failed to allege an unjust enrichment claim. Id.; see also Accuray,
 21 757 F. Supp. 2d at 935-936 (dismissing unjust enrichment claim that was predicated on the
 22 conclusory allegation that the directors of Accuray were "'unjustly enriched *as a result of the*
 23 *compensation and director remuneration they received while breaching fiduciary duties owed to*
 24 *Accuray*'") (emphasis added and citation omitted).

25 The same result follows here. Plaintiff does not allege that the Director Defendants failed
 26 to perform any work in connection with their service on the HP Board. Moreover, the Complaint
 27 does not allege that the Director Defendants directly profited from the alleged payment of bribes or
 28 kickbacks by a handful of HP employees. Plaintiff has not pled an unjust enrichment claim.

1 Plaintiff's unjust enrichment claim also fails because HP was contractually obligated to
 2 compensate the Director Defendants. (See, e.g., Horvath Decl. Ex. A, at 21 (describing annual
 3 compensation that each outside director "was entitled to receive" for his or her board service).)
 4 Those contractual obligations negate any unjust enrichment claim. See Nemec v. Shrader, Civil
 5 Action Nos. 3878-CC, 3934-CC, 2009 WL 1204346, at *6 (Del. Ch. Apr. 30, 2009) (dismissing
 6 unjust enrichment claim because "Delaware courts . . . have consistently refused to permit a claim
 7 for unjust enrichment when the alleged wrong arises from a relationship governed by contract");
 8 see also Wood v. Coastal States Gas Corp., 401 A.2d 932, 942 (Del. 1979) (affirming dismissal of
 9 unjust enrichment claim where there was a contract governing the parties' relationship and holding
 10 that "there can be no recovery under an unjust enrichment theory independent of [the contract]").

11 **V. THE DIRECTOR DEFENDANTS JOIN IN HP'S MOTION TO DISMISS.**

12 The Director Defendants join in the arguments made by nominal defendant HP in support
 13 of its motion to dismiss this action pursuant to Rules 12(b)(6) and 23.1 of the Federal Rules of
 14 Civil Procedure for Plaintiff's failure to make a demand on the HP Board before commencing this
 15 shareholder derivative action or to plead with particularity sufficient reasons to excuse demand.

16 **CONCLUSION**

17 For all the reasons set forth above, this Court should dismiss this action against the Director
 18 Defendants with prejudice.

19 DATED: August 15, 2011

20 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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